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October 8, 2008

Jeff S. Jordan, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 6049

Dear Mr. Jordan:

The undersigned represent the respondents, the Florida Democratic Party (the "Party") and Kosmas for Congress ("KFC"). This matter was generated by a complaint filed on August 12, 2008 by Clinton Eugene Curtis for alleged unfair Party support for his opponent in the 2008 primary. In 2006, Mr. Curtis was the Florida Democratic Party's candidate in the 24th Congressional District. In 2008, he ran against Suzanne Kosmas in the Democratic primary for the party's nomination for the same congressional seat. According to the summer's pre-primary polls and fundraising reports he trailed Ms. Kosmas by a large margin, and she eventually won the primary by more than a two-to-one margin. Mr. Curtis alleged that the Party unfairly supported Ms. Kosmas because: (1) KFC allegedly misled the public when its staff used the Party's telephone equipment and Party office space to make calls on her behalf but identified the calls as originating from the Party, and (2) using Party office space for her campaign. The complaint does not identify any particular provision of a statute or regulation that the Respondents allegedly violated.

The thrust of the complaint is that the Party supported the election of Ms. Kosmas when it should have remained neutral in the pre-primary period. Of course, even if that were true, it is not a violation of the Federal Election Campaign Act ("FECA") or any of the Commission's regulations for a state party to prefer and support one of the candidates vying for the party's nomination. Although not alleged, we will respond to the complaint as if it had alleged that the Party made a contribution to KFC that was not reported or exceeded the Party's contribution limits in violation of 2 U.S.C. §§ 434, 441(a) and 441a(d).

As described below, Mr. Curtis' factual allegations are not true. The Party – not KFC – used its own volunteers to make voter identification telephone calls from its own telephones in its own offices. Although the Party displayed pictures of Ms. Kosmas and KFC campaign literature was available in the Party's office, KFC did not use any Party office space. Thus, none of the alleged activity was a contribution to KFC, the Party used § 441a(d) funds to support Ms. Kosmas, and all of the Party's expenses were disclosed in its reports to the Commission. Accordingly, the complaint should be dismissed and the file closed.

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FACTS

Suzanne Kosmas and Clinton Curtis were candidates for the Democratic nomination for the U.S. House of Representatives for Florida's 24th District. It quickly became apparent that Ms. Kosmas would be the winner of the Democratic primary election, and thereby became the presumptive nominee. For example, in the March 31, 2008 and June 30, 2008 quarterly reports, her campaign reported net contributions of \$663,078 and \$1,142,305, respectively, while Mr. Curtis reported \$57,528 and \$69,890, respectively, even though he was the Party's nominee for the same seat in 2006. In fact, Ms. Kosmas eventually won 72% of the votes cast in the August primary election.

The Party began supporting Ms. Kosmas in July after she became the presumptive nominee. For example, the Party invited Ms. Kosmas and candidates for state office to send campaign literature to the Party's offices in the 24th District for display purposes. Ms. Kosmas' campaign was the first to respond, and her picture and campaign literature were prominently displayed as alleged in the complaint. When Mr. Curtis complained, rather than engage in a public disagreement, the Party removed Ms. Kosmas' campaign materials.

In the summer, the Party used its own employees and volunteers to make voter identification telephone calls. An example of a script follows:

Hi, is _____ available?

Hi, my name is _____, and I'm a volunteer in your neighborhood with the Campaign for Florida. How are you? (RESPONSE)

- Have you decided who you will be supporting for Congress in the elections in November?

- 1 = Strong SK = Will definitely be supporting SK
- 2 = Lean SK = Not 100% sure, but leaning SK or Dem
- 3 = UND = Completely Undecided
- 4 = Lean TF = Leaning toward supporting Tom Feeney
- 5 = Strong TF = Definitely supporting Tom Feeney

IF 1: Thank you so much for your support. We've just opened an office in Titusville. Will you consider volunteering in your local office? (If Yes, mark "Volunteer")

If 2-4: Great, well I hope you will consider supporting Suzanne. We need a strong, independent voice and someone who will truly represent us in Washington.

- **Have you decided who you will be supporting in the race for State House District 24?**
 Definitely Voting for Kendall Moore (2) Leaning Toward Kendall Moore (3) Undecided (4) Leaning Towards Thad Altman (5) Definitely Voting for Thad Altman
Democratic Candidate Kendall Moore will work hard to provide tax fairness, get our economy back on track, and holding Tallahassee accountable.

- **Have you decided who you will be supporting in the race for State House District 32?**
 (1) Definitely Voting for Tony Sasso (2) Leaning Towards Tony Sasso (3) Undecided (4) Leaning Towards the Steve Crisafulli (5) Definitely Voting for Steve Crisafulli
Thank you. Tony Sasso will be able to continue to forge the bi-partisan cooperation necessary to establish sound policies to benefit our economy and quality of life.

- **Have you decided who you will be supporting in the race for Brevard Supervisor of Elections?**
 (1) Definitely Voting for Dem Candidate Frank Grieco, Jr. (2) Leaning Towards Dem Candidate Frank Grieco, Jr. (3) Undecided (4) Leaning Towards the Republican (5) Definitely Voting for the Republican
Thank you. Democratic candidate Frank Grieco, Jr. will work to ensure fair elections in Brevard County so that every vote cast is a vote counted.

Thank you so much for your time today! Please visit
www.KosmasForCongress.com.

Paid for by the Florida Democratic Party and authorized by Suzanne Kosmas for Congress.
 This call has been paid for by the Florida Democratic Party.

The calls were made by Party volunteers and supervised by staff paid by the Party. See Attachment 1 (Payroll and W-4 forms). Some of these personnel were initially associated with KFC but moved to the Party prior to any of the telephone calls.

The telephone company did make an error and initially identified the telephone caller as KFC instead of Florida Democratic Party as alleged. When alerted to the problem, the Party immediately contacted AT&T to correct the mistaken caller ID information. More importantly, KFC did not pay for the calls. The telephone charges were paid by the Party. See Attachment 2 (AT&T July-August telephone bill). The Party used §441a(d) funds to pay the salaries and the telephone charges related to these voter identification calls.

DISCUSSION

I. The Complaint That Ms. Kosmas Knowingly Mislead The Public And Perpetrated A Fraud On The Voters Is Factually Incorrect And Legally Irrelevant.

A. Voter ID Telephone Calls

The complaint alleges that KFC's volunteers and hired staff made voter identification telephone calls but identified themselves as Florida Democratic Party volunteers and staff. Thus, Mr. Curtis concludes that KFC perpetrated a fraud by knowingly misleading voters about the source of the telephone calls, which implied that the Party was supporting Ms. Kosmas over Mr. Curtis. The complaint acknowledges that Mr. Curtis confronted Leonard Joseph, a Party official, who confirmed that the Party had made the voter identification calls, but Mr. Curtis does not believe Mr. Joseph.

As described above, the Party did support Ms. Kosmas when she became the presumptive winner of the primary, and the Party did use its own staff, volunteers and telephones to make voter identification calls to determine whether a voter was a supporter of Ms. Kosmas and other Democratic candidates (but not Mr. Curtis). See Attachments 1 and 2. No one at KFC made the alleged voter ID calls, no one made a misleading statement, and Ms. Kosmas and her campaign did not perpetrate a fraud.

The complaint alleges that some of the voter identification calls came from telephones that the telephone company caller ID showed as originating from KFC rather than the Party. This allegation is true and was corrected when it was brought to the attention of the Party. But it is an example of an innocent mistake by the telephone company that was promptly corrected by the Party. KFC was not involved and did not mislead anyone.

B. Party Office Space

The complaint's other allegation is that the Party permitted KFC staff to use the Party's office and equipment, which also misled the public into believing that the Party was supporting Ms. Kosmas over Mr. Curtis. Evidence of this allegation is the mistaken caller ID information described above, the existence of KFC campaign literature and pictures of Ms. Kosmas in the Party's office and KFC staff in the Party's office.

The Party invited all of the candidates and presumptive candidates including Ms. Kosmas (but not Mr. Curtis) to send campaign literature for display in its offices. KFC was the first to respond. When Mr. Curtis saw Ms. Kosmas' picture in the Party's office, he complained and the pictures were removed. The Party was not obligated to remove the pictures, but the removal is further evidence that KFC did not use the Party's office space.

Mr. Curtis may have seen former KFC staffers in the Party's office because some former staffers moved to and were employed by the Party. See e.g. Attachment 1. Their presence in the Party's office is not evidence that KFC used the Party's office space.

C. The Allegations Are Legally Irrelevant

The complaint alleges that KFC intentionally engaged in activities that mislead the public into believing the Party supported Ms. Kosmas over Mr. Curtis in the primary election thereby perpetrating a fraud on the voters. Although we have shown that the Party did support Ms. Kosmas over Mr. Curtis in the election and, therefore, no misleading statements were made, the allegation is irrelevant. The FECA does not regulate campaign speech, and the Commission does not have the jurisdiction to investigate whether campaign speech is misleading.

Mr. Curtis' actual complaint is that the Party made a decision to support its presumptive nominee and that candidate was not Mr. Curtis. His recourse was to have the voters reject the Party's decision rather than complain to the Commission, which has no jurisdiction over his complaint.

II. EVEN IF, *ARGUENDO*, THE COMPLAINT HAD ALLEGED AN ILLEGAL CONTRIBUTION OR A FAILURE TO DISCLOSE PARTY CONTRIBUTIONS OR § 441a(d) EXPENDITURES, THE CONTRIBUTIONS AND EXPENDITURES WOULD HAVE BEEN LEGAL AND DISCLOSED.

A. No Contributions, Other Than § 441a(d) Expenditures, Occurred.

The complaint alleges that the Party made available to KFC the Party's office space and telephone equipment at no cost. Although the complaint did not allege a violation of FECA, providing, free office space and telephone equipment could be, in certain circumstances, an in-kind contribution that had to be disclosed pursuant to 2 U.S.C. § 434 and applied to the Party's contribution or § 441a(d) limits to KFC. As described above, the factual allegation is incorrect – the Party used its own personnel, office space and equipment to make phone calls, and KFC did not use the Party's office space. Thus, no in-kind contribution occurred.

Furthermore, when a state political party's "employees that execute[] the field program[are] at all times supervised and controlled by the [state party's] executive director, and [are] never under the supervision or control of [the candidate], expenditures for their salaries benefits cannot be directly attributable to [the candidate]. Nor can the [state party's] expenditures for office space and other overhead costs be directly attributed to [the candidate], as the [state party] offices are occupied by [state party] staff conducting [state party] business." MUR 5564: Statement of Reasons of Chairman Robert D. Lenhard, at 5 (footnote omitted). Thus, even if, *arguendo*, the complaint's allegations had even a scintilla of credibility, it still would not allege a violation of the FECA.

B. § 441a(d) Expenditures Were Properly Disclosed

With respect to the voter identification telephone calls that included references to Ms. Kosmas, the Party made and disclosed § 441a(d) expenditures for those calls. The Commission has a "longstanding policy of permitting political party committees to avail themselves of the 2 U.S.C. 441a(d) limits, both before and after a party's primary, without any showing of candidate authorization or actual 'coordination' with a candidate." 67 Fed. Reg. 76968 (2002) (11 CFR

110.11(d) Explanation and Justification). "It is up to the party committee to decide." Party Expenditures vs. Contributions, *Campaign Guide for Political Parties*, at 16. In fact, "communications made by a political party committee pursuant to 2 U.S.C. 441a(d) that are distributed prior to the date the party committee's candidate is nominated need not carry disclaimers." 67 Fed. Reg. 76968. Thus, neither the Party nor KFC violated the FECA's contribution or expenditure limits, or its reporting obligations.

CONCLUSION

For all of the reasons described above, the Commission should find no reason to believe any violation of the law occurred, the complaint should be dismissed, and the Commission should close the file.

Respectfully submitted,



Neil P. Reiff
Stephen E. Hershkowitz

Counsel to
Florida Democratic Party and
Kosmas For Congress

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